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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ANN R. WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can courts of appeals or district courts read into 28 U.S.C. § 455 a timeliness requirement which Congress deliberately failed to include in the statute?

2. Can an appeals court evade the responsibility to rule on the merits of an issue in contravention of a congressional statute?

3. Does a court of appeals err in failing to find that a district court judge should have recused himself pursuant to 28 U.S.C. § 455(a) when during the pendancy of an action in his court he held offices in defendant organization?

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OCTOBER TERM, 1988

ANN R. WILLNER,
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vs.

UNIVERSITY OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Ann R. Willner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on June 1, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 848 F. 2d 1020 and is reprinted in the appendix hereto, p. A1, *infra.*

The memorandum decision of the United States District Court for the District of Kansas (Rogers, D.J.) has not been reported. It is reprinted in the appendix hereto, p. A10, *infra.*

JURISDICTION

The jurisdiction of the United States District Court for the District of Kansas was invoked under 29 U.S.C. § 206(d) and 42 U.S.C. §§ 2000e, *et seq.* On May 20, 1985, the jury reached a verdict for defendant and on August 2, 1985, the District Court found for the defendant. See p. A10, *infra*.

On petitioner's appeal, the Tenth Circuit on June 1, 1988 entered a judgment affirming. See p. A1, *infra*. The Court of Appeals denied a timely petition for rehearing on July 25, 1988. See p. A9, *infra*.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served

during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

STATEMENT OF THE CASE

Petitioner is and has been a professor of political science at the University of Kansas since 1970 and worked as a political scientist in academia, government and internationally for twenty years prior to 1970. Petitioner filed a suit in Kansas Federal District Court (Rogers, D.J.) in April, 1979 pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000, *et seq.*, 42 U.S.C. § 1983, Title IX and amended to add the Equal Pay Act, 29 U.S.C. § 206(d). Plaintiff's complaints against the University of Kansas included discrimination in salary on the grounds of sex, failure to award plaintiff courses in her fields of expertise, refusal to consider plaintiff for sabbatical leaves, and reduction of her salary and status because she had complained about discrimination against herself and other women and had filed a charge with the E.E.O.C.

The District Court dismissed the charges of failure to consider petitioner for sabbatical leave and to grant her courses in her areas of expertise on the basis that they were not considered by the E.E.O.C. and did not grow out of the E.E.O.C. investigation. In point of fact, the second, *i.e.*, sabbatical, occurred subsequent to the E.E.O.C. decision and the issue of courses was considered by the E.E.O.C. The District Court dismissed the charge under § 1983 on the grounds that the University of Kansas was immune to suit by virtue of Eleventh Amendment immunity. The District Court restricted petitioner's discovery to the Department of Political Science and refused to certify for appeal petitioner's attempt to appeal that limitation. Upon a motion by defendant for dismissal, all discovery was stayed for well over a year. Petitioner's discovery was further limited by the Court in various pretrial orders.

Petitioner's first attorney failed to file a timely response to respondent's motion to dismiss and failed to prosecute the case properly, after which he withdrew on petitioner's request, upon advise from an attorney she had consulted through the auspices of the American Association for University Professors. This attorney then commenced to represent her and withdrew in 1982 after it emerged that he was in conflict of interest. Further irregularities occurred with a firm of attorneys which undertook petitioner's representation thereafter and plaintiff was forced to act pro se from June, 1983 until April, 1985, two weeks before trial. When plaintiff, acting pro se, ascertained that Judge Rogers was subject to disqualification by virtue of his position as a director of respondent's alumni association, she promptly filed a motion to that effect pursuant to 28 U.S.C. § 455(a) and (b). The District Court failed to answer the motion for eleven months and then failed to deal with the issue. Instead the District Court evaded the issue by stating that the reason was identical with a reason given in a motion for disqualification filed by petitioner's sister (who also had a case in his court) and by attaching a copy of his order in the latter's case. In point of fact the reasons were not identical.

Within a month after learning that Judge Rogers had another close relationship to respondent University of Kansas and close personal interest thereby by virtue of his membership on the Board of Directors of the Law School of respondent University and his presidency of said board, plaintiff filed a second motion for disqualification in January, 1985, this one pursuant to 28 U.S.C. § 455(a). When seven weeks passed without a response from Judge Rogers, petitioner filed a petition for mandamus with the

Tenth Circuit Court of Appeals (No. 85-1283). Judge Rogers then responded refusing to disqualify himself. He cited other cases in which disqualification was not granted which he claimed were similiar or analogous to his situation. Petitioner then filed a supplementary memorandum in support of her petition for mandamus, analyzing each of the cases referred to by Judge Rogers. She argued that a comparison of the facts in each of these cases did not support Judge Rogers' contention that his association with respondent was less significant than the relationships in the cases he cited. She argued that "the associations and relationships between the judges and the parties in the cases cited were either indirect, impersonal, tenuous or else antedated the filing of those cases in the courts. Judge Rogers' associations with defendant, in contrast, are direct, personal, close and taking place during the pendancy of the instant case."

The Tenth Circuit refused to grant the petition for mandamus.

Petitioner's appeal to the Tenth Circuit included eight issues which this Court refused to consider as not warranting discussion, including: the limiting of scope of discovery to the Department of Political Science as the "establishment;" the dismissal of petitioner's other claims; the exclusion of the investigative findings of a University of Kansas Ad Hoc Affirmative Action Investigation Committee which had found that discrimination existed in that department; the limitation of causes of action to fewer years than was brought out in trial evidence; the Trial Court's clearly erroneous findings of fact.

REASONS FOR GRANTING THE WRIT

I

The decision of the Tenth Circuit conflicts with 28 U.S.C. § 455 in reading into that statute a timeliness requirement which Congress deliberately failed to include and conflicts with decisions of other circuits.

This case presents an important issue of statutory construction concerning which there is a conflict among the circuits. The issue is whether a court can impose a timeliness requirement on a motion for judicial disqualification filed under 28 U.S.C. § 455.

In this case, the Tenth Circuit stated that a motion filed pursuant to this statute "*must* be timely filed," Pet. App. A1. The Tenth Circuit has thereby sought to make mandatory a requirement which was specifically disclaimed by Congress. The legislative history of the 1974 amendment to 28 U.S.C. § 455 makes it clear that there is no particular procedure that must be followed by a party to obtain judicial disqualification of federal judges. See *Roberts v. Bailar*, 625 F. 2d 125, 128 (6th Cir. 1980). In fact, Congress deliberately disregarded attempts to apply requirements such as timeliness. *Id.* fn. 8. In *Delesdernier v. Porterie*, 666 F. 2d 116 (5th Cir. 1982) at 120, it is specifically noted that the Justice Department suggested that the new statute should include a specific limitation of time. "However, Congress did not, for reasons of its own, incorporate this recommendation into the statute."

The Seventh Circuit has also taken the position that the provisions of this statute do not contain time limits within which disqualification must be sought. See *SCA Services Inc. v. Morgan*, 557 F. 2d 110, 117 (1977).

Other circuits have either ignored the disinclination of Congress to include a timeliness requirement in the statute and chosen to treat § 455 as if it were idental to § 144 or have recognized the absence of such a requirement in § 455 and chosen to insert one or see, one as implicit. The Second Circuit, in *In Re International Business Machines Corp.*, 618 F. 2d 923 (1980) at 932 noted that § 144 "explicitly requires that the motion must be timely made" and proceeded to state as follows with reference to § 455: "While section 455 has no such requirement, we have without explication previously assumed that timeliness was also requisite under the amended statute." After having referred to *SCA Services, supra,* the Court stated: We see no reason why there should not be a timeliness requirement here even without an explicit statutory provision." *Ibid.*

The Fifth Circuit, in *Delesdernier v. Porterie, supra,* at 121, having taken specific note of the refusal of Congress to act upon the suggestion of the Department of Justice, as noted above, proceeded to state: "We . . . are unconvinced that the question is conclusively determined by the legislative history of the 1974 amendments, and we must base our decision on other considerations as well." In another case later the same year, *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F. 2d 1157, 1164, the Fifth Circuit unequivocally stated: "Both 28 U.S.C. §§ 144 and 455 require that a motion to disqualify be timely filed."

The Eighth Circuit in *Oglala Sioux Tribe v. Homestake Min. Co.*, 722 F. 2d 1407, 1414 (1983), recognized that § 455 does not include an explicit time limitation but stated "we believe that a timeliness requirement is appropriate . . ." The Ninth Circuit also recognized the

lack of procedural requirements in § 455 (See *United States v. Sibla*, 624 F. 2d 864, 867 (1980)). After examining decisions on disqualification in several circuits in *United States v. Conforte*, 624 F. 2d 869, the Ninth Circuit concluded at 880 that "timeliness cannot be disregarded in all cases involving the delicate matter of disqualification under 455, although, as we did in *Sibla*, we leave open here the question whether timeliness may be disregarded in exceptional circumstances."

Prior to its ruling in this case, the Tenth Circuit ruled in this decade in a number of cases in which, unlike this case, disqualification motions had been filed under both §§ 144 and 455. In *United States v. Hines*, 696 F. 2d 722, 728 (1982), this court of appeals distinguished between the requirements for disqualification in § 144 and § 455 and stated that the "effective scope of section 455 is much broader. There are no procedural hurdles . . ." and went on to cite and quote from *Roberts v. Bailar, supra* on the failure of Congress to include procedural requirements in § 455. In *Franks v. Nimmo*, 796 F. 2d 1230 (1986) this Court at 1234 again found the scope of § 455 to be broader than that of § 144 "in part because it contains no express procedural hurdles," citing and quoting from its decision in *Hines, supra*. Ruling on a petition for mandamus in *Hinman v. Rogers*, 831 F. 2d 937, 939 (1987), the Tenth Circuit cited and quoted from its prior decisions in *Franks v. Nimmo* and *Hines, supra*, in ruling separately on §§ 144 and 455, again emphasizing the broader scope of § 455 and its lack of procedural hurdles.

The Eleventh Circuit, in a case in which a motion for disqualification was filed solely under § 455, found a timeliness requirement in the statute. See *United States v. Slay*, 714 F. 2d 1093, 1094 (1983).

In addition to the confusion in the circuits over a timeliness requirement under § 455, there is also disagreement, inconsistency and confusion over the standard or criteria for the application of such a requirement, whether under both §§ 144 and 455 or § 455 alone. Some circuits have applied a test of length of time from the time of filing or affirmed such a test, whereas others have applied or confirmed a test of when the party seeking recusal had knowledge of the facts upon which the motion for recusal was based.

This Court did not rule specifically on timeliness in *Liljeberg v. Health Services Corp.*, 108 S. Ct. 2194, 100 L. Ed. 2d 855 or at least on timeliness with specific reference to § 455, as best as this petitioner understands this Court's decision, although timeliness appeared, at least implicitly, to have been an issue. The disarray in the circuits and district courts on both timeliness and the proper interpretation of the statute calls out for this Court's consideration.

II

An Appeals Court should not evade its responsibility to rule on the merits of an issue in contravention of a congressional statute.

There is a strong presumption that the Tenth Circuit in this case imposed a timeliness requirement, contrary to congressional intent in 28 U.S.C. § 455, to evade and avoid ruling on the merits of the disqualification issue. This presumption is strengthened by the fact that in prior cases on the issue of judicial disqualification, this Court ruled on the merits of disqualification under § 455 despite having found or confirmed untimeliness. See *Singer v. Wad-*

man, 745 F. 2d 606 (1984); see also *Franks v. Nimmo, supra; Hinman v. Rogers, supra.*

The presumption is further strengthened by the fact that petitioner appealed the District Court's refusal to disqualify himself solely pursuant to 28 U.S.C. § 455(a). Not only is there no timeliness requirement under the statute but there is no basis for attempting to assimilate § 455 to § 144 has been done by some courts when a disqualification motion has been filed under both statutes.

This evasion of judicial obligation does not merely impose an injustice upon petitioner seeking relief. It brings into question the integrity of the appeals court and of the federal judicial system. Neither justice nor the appearance of justice is thereby served. It is not an easy task for judges to rule on the disqualification of other judges. When judges even in a single instance fail to fulfill such a responsibility, the confidence in the integrity of the judicial system is undermined.

III

The Appeals Court erred in failing to find that the district court judge should have disqualified himself and in failing to remand for a new trial before a different judge.

Petitioner filed for disqualification and filed a mandamus petition requesting the Court of Appeals to order disqualification pursuant to 28 U.S.C. § 455 on the basis that a reasonable person in full knowledge of the fact that the district judge served on the Board of Governors of the law school of defendant university and as president of said board and served as a director of the alumni association of defendant university during the pendancy of the

proceeding in his court would have reason to doubt the impartiality of said judge.

Pursuant to this statute the judge should have disqualified himself. The Tenth Circuit should have, we believe, found that he should have disqualified himself if only on the basis of the "reasonable man" and "appearance of bias" test. The facts of the judge's close ties to the defendant in the action in his court were clear and indisputable and he did not dispute them. These facts were *more* than sufficient to meet the reasonable doubt standard of § 455(a).

In *Potashnick v. Port City Constr. Co.*, 609 F. 2d 1101, 1111 (5th Cir. 1980) the Fifth Circuit noted that the goal of the statute was to "foster the *appearance* of impartiality" and explained its rationale as follows:

> This overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, "the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *United States v. Columbia Broadcasting System, Inc.*, 497 F. 2d 107, 109 (5th Cir. 1974). Any question of a judge's impartiality threatens the purity of the judicial process and its institutions.

This overriding concern with appearances was earlier and more succinctly expressed by the 10th Circuit Court in *Webbe v. McGhie Land Title Co.*, 549 F. 2d 1358 at 1361 in stating "appearance of impartiality is virtually as important as the fact of impartiality."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

(June 1, 1988)

Ann R. WILLNER,
Plaintiff-Appellant,

v.

UNIVERSITY OF KANSAS,
Defendant-Appellee.

No. 85-2320.

United States Court of Appeals,
Tenth Circuit.

June 1, 1988.
As Amended July 25, 1988.
Rehearing Denied July 25, 1988.

University professor filed Equal Pay Act complaint against university alleging discriminatory salary determinations. The United States District Court for the District of Kansas, Richard Dean Rogers, J., entered judgment on jury verdict for university, and professor appealed. The Court of Appeals held that: (1) parol evidence instruction did not prejudice professor and did not warrant reversal of verdict against professor, and

(2) denial of professor's untimely motions for recusal of judge did not constitute abuse of discretion.

Affirmed.

1. Federal Courts (Key) 908

Instruction in Equal Pay Act trial not to consider university professor's parol evidence did not prejudice her and did not warrant reversal of jury verdict against her, as an exchange of letters between the professor and the university regarding acceptance of employment constitute an integration of the parties' employment contract. Fair Labor Standards Act of 1938, § 6, as amended, 29 U.S.C.A. § 206.

2. Judges (Key) 51(2)

Denial of university professor's motion to recuse judge from Equal Pay Act trial on grounds that judge was affiliated with university was not abuse of discretion where judge had invested four and a half years in the cases before professor first moved for recusal. 28 U.S.C.A. §§ 144, 455, 455(a), (b)(1); Fair Labor Standards Act of 1938, § 6, as amended, 29 U.S.C.A. § 206.

Ann R. Willner, pro se.

Rose Marino, Associate Gen. Counsel, University of Kansas, Lawrence, Kan. (Mary Beth Mudrick, Topeka, Kan., with her on the brief), for Defendant-Appellee.

Before WRIGHT, ALARCON and HALL, Circuit Judges.*

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*Honorable Eugene A. Wright, Honorable Arthur Alarcon, and Honorable Cynthia Holcomb Hall, Circuit Judges, United States Court of Appeals for the Ninth Circuit, sitting by designation.

PER CURIAM.

This case originated in a sex-discrimination suit against the University of Kansas. Claims tried in simultaneous bench and jury trials were resolved in the University's favor. Professor Willner appeals. We conclude that only two of her arguments on appeal warrant discussion: Was Willner prejudiced by the parol evidence instruction? And did the trial judge err by not recusing himself? Her other challenges we reject without comment. Affirmed.

1. PAROL EVIDENCE INSTRUCTION

Professor Ann Willner joined the University of Kansas political science faculty in the fall of 1969. Their association was not pacific. As early as spring of 1970 the parties disagreed over her teaching obligations. In 1977 she filed a complaint with the EEOC, alleging sexual and other discrimination. In that year the University demoted her to nine-tenths salary status. She sued.

Her Equal Pay Act complaint alleged discriminatory salary determinations dating back to 1970. At trial the University claimed that those salary determinations were based on a valid merit system and noted Willner's continual refusal to teach the normal political science faculty course load of five classes per year. Willner countered that the University's merit system defense was pretextual.

The parties dispute the terms of Willner's initial employment contract. She argues that she contracted for a reduced teaching load of two courses per semester. The University contends that no such bargain was struck.

The jury deciding the Equal Pay Act claim, and the judge deciding the Title VII claim, found in the University's favor. Judgment for the University was entered on both counts.

At issue in this appeal is the parol evidence instruction in Willner's jury trial. The parties had presented conflicting evidence of their contract. Willner emphasized her extended discussions with the department chairman that preceded her written acceptance of the University's offer of employment. The University emphasized that those preliminary discussions were not made part of the negotiating parties' agreement; and that even if the department chairman had intended to strike such a deal, he had no authority to do so—only an offer from the dean of the college could bind the University.

The parties submitted written evidence of their contract. The record reveals that following several weeks of negotiations between Willner and the political science department, the college dean wrote her to offer "the position of Associate Professor of the [Department of] Political Science for the year beginning in September, 1969, at a salary of $15,000 for the nine-month academic year."[1] Willner responded, in full:

> Dear Dean Cobb: This is to confirm my acceptance of the position offered in your letter of March 20 of Associate Professor in your Department of Political Science, beginning in September, 1969. I enjoyed

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1. The letter also indicated that the faculty handbook contained the rules pertaining to faculty and welcomed Wilmer to the campus. Neither party argues that the faculty handbook was relevant to this aspect of their dispute.

> my visit to your campus and look forward to joining your faculty. Sincerely, Ann Ruth Willner.

The University insisted that that was the parties' integrated contract. And as one of its instructions to the jury considering Willner's Equal Pay Act claim, the trial court read this charge:

> If there is written evidence of an offer and acceptance of employment, which sets forth the terms of employment, then the written documents are the only evidence of the agreement. Evidence of prior oral statements concerning the terms of employment may not be used to attempt to alter the terms of the written agreement.

Instruction 13. Willner objected to that instruction at trial, arguing that it kept proper evidence from the jury.[2]

In analyzing that instruction, regarding this contract made and performed in Kansas, we apply Kansas law. Kansas law is that "[t]he parol evidence rule is not a rule of evidence but of substantive law. Its applicability is for the court to determine, and, when the result is reached, it is a conclusion of substantive law." *In re Goff's Estate*, 191 Kan. 17, 379 P.2d 225, 234 (1963) (quoting *Phipps*

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2. Counsel argued:

> I will object to 13 on the grounds that there was some evidence to indicate that the written document did not contain all the terms, that there were other terms, even some other documents making reference to the terms, that the written letter did not integrate the entire terms or reflect the intent of the parties and that the jury should consider all evidence and other evidence outside the letter of appointment to determine what the intent of the parties was and what the nature of the agreement was. So plaintiff will object to 13.

v. Union Stock Yards Nat'l Bank, 140 Kan. 193, 34 P.2d 561, 563 (1934)).[3]

Having heard the same evidence of the parties' contract in the simultaneous Title VII (bench) and Equal Pay Act (jury) trials, Judge Rogers found:

> Since 1969, each faculty member of the Department has generally been required to teach five courses each academic year. Plaintiff has been subject to this requirement since she was employed. *No agreement was ever reached between the plaintiff and the administration at KU or any chairperson of the Department which allowed plaintiff to teach less than five courses each academic year.* Chairperson Lujan had informed plaintiff when she was hired that the Department was working to reduce the course load of the faculty, but no guarantees were made that the course load would be reduced. Plaintiff was informed on a number of occasions after she was hired that the Department expected her to teach five courses each academic year.

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3. The authorities generally recognized by Kansas courts are to the same effect. Questions of integration are more factual than legal in nature (turning on intent of the parties), *see generally* 3 *Corbin on Contracts* § 588, pp. 528-29 (1960), but whether particular offered testimony alters or contradicts the writing is a question of law. *See id.* at § 595, p. 572. "If the question is merely as to the completeness of the integration (there being no contradiction in terms), making it necessary to determine whether the proposed addition to the writing is one that ordinary men may reasonably be expected not to include in the writing that is in court, probably the court should usually decide it." *Id. Accord*, Restatement (Second) of Contracts, § 209(2): "*Integrated Agreements* . . . Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to the application of the parol evidence rule."

August 2, 1985 Memorandum and Order at 6 (Title VII Case) (Finding of Fact 12) (emphasis added).

[1] We infer from that finding that Judge Rogers determined that the exchange of letters constituted an integration of the parties' contract. Accordingly, he could properly instruct the jury in the Equal Pay Act trial not to consider Willner's parol evidence. We conclude that Instruction 13, while no model of clarity, did not prejudice Willner and does not warrant reversal of the jury verdict.

2. RECUSAL

[2] Professor Willner contends that Judge Rogers erred by not recusing himself pursuant to 28 U.S.C. § 455 (a) and (b)(1).[4] Such motions must be timely filed. *See Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir.1984) (motion to recuse under 28 U.S.C. §§ 144 and 455, filed one year after complaint was filed and after movant had suffered some adverse rulings, held untimely), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1396, 84 L.Ed.2d 785 (1985); *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir.1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984); *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1164 n. 3 (5th Cir.1982), *cert. denied*, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983); *In re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980). We review their denial for abuse of discretion. *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226, 1227 (10th Cir.1987).

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4. Section 455 provides:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b)(1) He shall also disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Willner initiated this litigation in April, 1979. She first moved for Judge Rogers' disqualification on September 28, 1983.[5] In the intervening four years she had twice amended her complaint (her December 1982 motion to file and proceed upon a third amended complaint was denied), and considerable discovery had been completed. She filed a second motion for disqualification January 2, 1985.[6] The trial court denied those motions, and on March 27, 1985 this court denied her petition for mandamus compelling Judge Rogers to recuse himself.

Granting a motion to recuse many months after an action had been filed wastes judicial resources and encourages manipulation of the judicial process. *See In re International Business Machines Corp.*, 618 F.2d at 933 and *Chitimach Tribe*, 690 F.2d at 1164 n. 3. Here, Judge Rogers had invested four and one half years in these cases before Willner first moved for recusal. Without reaching the question whether Willner's several allegations might ever suffice in a timely-filed § 455 motion, we conclude that denial of these untimely motions did not constitute abuse of discretion.

AFFIRMED.

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5. She urged three grounds for recusal: (1) Judge Rogers' position as a director of the University of Kansas Alumni Association, which overlapped eary stages of this litigation; (2) a statement she alleged he was heard to make ("Those women over there! If they don't get the high-paying jobs they want, they holler discrimination"); and (3) comments he directed at her during a hearing in June, 1983 (concerning the number of attorneys who had represented her, the many delays in her case, and the number of sex discrimination cases pending in his court).

6. She alleged one new ground for disqualification in her second motion: Judge Rogers' position on the Board of Governors of the University of Kansas Law School. She also reiterated her concern about his position as a director of the University of Kansas Alumni Association through June, 1981.

APPENDIX B

(July 25, 1988)

Before the Honorable Eugene A. Wright, Honorable Arthur L. Alarcon and Honorable Cynthia Holcomb Hall, Circuit Judges.

No. 85-2320

ANN R. WILLNER,
Plaintiff-Appellant,

vs.

UNIVERSITY OF KANSAS,
Defendant-Appellee.

This matter comes on for consideration of plaintiff-appellant's petition for rehearing filed June 20, 1988.

Upon consideration thereof, the petition is denied.

/s/ Robert L. Hoecker
Robert L. Hoecker
Clerk

APPENDIX C

(Filed August 2, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 79-4069-W

ANN R. WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS,
Defendant.

MEMORANDUM AND ORDER

INTRODUCTION

This is an employment discrimination action brought by the plaintiff, Ann R. Willner, against the defendant, the University of Kansas. Plaintiff, a professor of political science at the University of Kansas, alleges that the defendant discriminated against her because of her sex in salary determinations and retaliated against her because she filed a complaint with the Equal Employment Opportunity Commission alleging sex discrimination. Plaintiff brought this action pursuant to the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. §206 (d). A trial was held in this case beginning May 8, 1985. A jury was impaneled for the purpose of deciding plaintiff's Equal Pay Act claim while the court had the responsibility of determining plaintiff's Title VII

claims. On May 20, 1985, the jury reached a verdict on plaintiff's Equal Pay Act claim. The jury found that the defendant had not discriminated against the plaintiff because of her sex in salary determinations. Having carefully considered the evidence and arguments before the court, we are now prepared to issue the following findings of fact and conclusions of law on plaintiff's Title VII claims.

FINDINGS OF FACT

1. Plaintiff Ann R. Willner received a bachelor of arts degree from Hunter College in New York, New York in 1945. She received a masters of arts degree in 1946 from Yale University. She then taught, did research, and worked in several foreign embassies. In 1961, she received a doctorate of philosophy from the University of Chicago. In 1964, she began working at the Center of International Studies at Princeton University.

2. The University of Kansas (KU) is a state educational institution operated and managed under the supervision of the Kansas Board of Regents. The monies available for faculty salaries each year depend on the annual amount appropriated by the Kansas legislature.

3. The Department of Political Science (Department) is a part of the College of Liberal Arts and Sciences within the University. The Department is administered by a chairperson. The chairperson is elected by the other members of the Department. Herman Lujan served as the chairperson of the Department from 1969 to 1972. Earl Nehring was the chairperson from 1972 to 1981. Paul Schmacher began serving as chairperson in 1981.

4. In the late 1960's, plaintiff was recruited by members of the Department at the University of Kansas. In

February, 1969, plaintiff visited KU to consider the possibility of joining the Department. During her visit, she met with members of the Department. She discussed the possible terms of her employment with the chairperson designate, Herman Lujan. Following her visit, the members of the Department recommended that she be offered a position. Thereafter, Robert P. Cobb, acting Dean of the College of Liberal Arts and Sciences, offered plaintiff the position of associate professor of political science beginning in September, 1969, at a salary of $15,000.00 for a nine-month academic year. Plaintiff accepted this offer on April 22, 1969.

5. The Political Science department at KU in 1969 had 22 members. Plaintiff was the only woman. She was the first woman hired in the fifty-five year existence of the Department. The historical lack of women in the Department was due to the small number of women in the political science field.

6. In 1970, upon the recommendation of her colleagues in the Department, plaintiff was promoted to full professor and her salary was increased to $16,000.00.

7. Since plaintiff has been employed at KU, the Department has used a merit system for the evaluation of faculty salary increases. This system provides for the creation of an advisory committee of faculty members chosen by the chairperson of the Department. The committee is composed of four faculty members and one student. The task of the committee is to evaluate their fellow faculty members within the Department based on the following criteria: teaching, research and service. Under the system, each faculty member in the Department is required to submit information to the committee

for evaluation purposes. The members of the committee then individually rate each faculty member. Thereafter, the committee meets and discusses the individual ratings. A final committee rating is then determined for each faculty member. This rating is then submitted to the chairperson as the committee's recommendation. The chairperson reviews the rating and then makes any adjustments he considers "necessary and justifiable". The ratings are then reported to each faculty member and a period of time is given in which the faculty member can discuss the evaluation with the chairperson. The faculty member can request reconsideration of the evaluation. If reconsideration is requested, the chairperson presents the matter to the advisory committee. The committee then meets and decides if reconsideration is needed. The faculty member is then advised as to the final determination made by the committee and the chairperson. Based upon the final determination, the committee recommends how the monies available should be allocated. The faculty members are then advised of the salary recommendations that the chairperson will make to the Dean of the College of Liberal Arts and Sciences.

8. The criteria used in the Department's merit evaluation system—teaching, research and service—are the same used by the University for tenure and promotion. In the early 1970's, the procedures and criteria used by the Department in the merit evaluation system were apparently unwritten. However, these procedures and criteria were well known by the members of the faculty. In the mid-70's, the procedures and criteria appeared in written form and were distributed to the faculty. The teaching factor is based on student evaluations, faculty awards, teaching load and student comments. Faculty

members are required to obtain student evaluations on forms provided by the University to submit to the advisory committee. The research aspect of the evaluation system is based on the quality and quantity of a faculty member's research activity. Greater weight is given to published books and articles with lesser weight given to book reviews and convention papers. The service portion of the formula is based on the faculty member's activity on Department and University committees as well as participation in professional organizations. A faculty member's rank as professor, associate professor or assistant professor is not a critical factor in the merit evaluation process.

9. In January, 1979, the Department adopted new policies concerning merit evaluations. These policies provided as follows:

> (1) Any faculty member who does not submit an Annual Faculty Report and/or a Summary Report which covers the evaluation period will be rated *Poor* for research and service activities for that evaluation period.
>
> (2) Any faculty member who does not submit for merit evaluation purposes the results of C&I student surveys for regular courses taught during the evaluation period will be rated *Poor* for teaching activity during that period. Faculty members may submit such supplementary materials related to teaching performance as they desire. (This policy will apply to courses taught for Spring 1979 and subsequent semesters.)

10. Plaintiff refused to participate in the merit evaluation process from 1977 through 1979 by not submitting

information to the advisory committee for review. In 1977 and 1978, plaintiff's ratings suffered because of her lack of participation. In 1979, plaintiff received a "poor" rating in accordance with Department policy because of her refusal to participate.

11. In some years, plaintiff refused to use the forms provided by the University for student evaluation of a professor's performance. Rather, plaintiff prepared her own form and submitted it to her students. The Department required that all faculty members use the University's form so that equality and uniformity could be achieved in the merit evaluation system.

12. Since 1969, each faculty member of the Department has generally been required to teach five courses each academic year. Plaintiff has been subject to this requirement since she was employed. No agreement was ever reached between the plaintiff and the administration at KU or any chairperson of the Department which allowed plaintiff to teach less than five courses each academic year. Chairperson Lujan had informed plaintiff when she was hired that the Department was working to reduce the course load of the faculty, but no guarantees were made that the course load would be reduced. Plaintiff was informed on a number of occasions after she was hired that the Department expected her to teach five courses each academic year. In January, 1977, plaintiff informed chairperson Nehring that she intended to teach only four courses during the 1977-1978 academic year. In a letter of April 12, 1977, Frances Horowitz, Associate Dean of the College of Liberal Arts and Sciences, informed plaintiff that her appointment would be reduced because she refused to teach the required course load. The letter stated:

I have received notification from Professor Earl Nehring that you have indicated your willingness to be listed for only four courses for the academic year 1977-1978 and not for the five courses expected of every member of the Department of Political Science. In accordance with my letter to you dated January 31, 1977, and that of University Attorney Charles H. Oldfather to Mr. Michael Lerner of March 14, 1974, it is my duty to inform you that your appointment for 1977-1978 will be recorded as .9 and compensated at the rate of .9 of your full time appointment. This arrangement will remain in effect until such time as you are willing to assume a five course teaching load per academic year. Should this occur I shall recommend that your appointment be returned to full time.

13. Plaintiff's salary increases from 1970 through 1981 have generally been toward the bottom of the Department's increases. Plaintiff's salary has increased from $15,000.00 in 1969 to $25,330.00 in 1981. The extent of the plaintiff's salary increases has always been determined by the application of the Department's merit evaluation system.

14. Since plaintiff has been a member of the faculty at KU, the procedures utilized by the Department to determine faculty salary increases have been applied equally and fairly and without regard to sex or any other illegal factor. Salary increases have been based solely upon the performance of the faculty member as gauged by the factors of teaching, research and service.

15. During the course of her employment at KU, plaintiff has made a number of complaints of sex dis-

crimination to members of the Department and administrators in the College of Liberal Arts and Sciences and the University. On January 16, 1977, plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination against the University of Kansas in salary matters.

16. The University did not discriminate against plaintiff because of her sex in salary determinations or teaching requirements. Further, the University did not retaliate against plaintiff because she made complaints of sex discrimination. Plaintiff continues to be employed as a professor at the University of Kansas at the present time.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f).

2. Defendant University of Kansas is an employer within the definition of Title VII. 42 U.S.C. §2000e(b).

3. Title VII makes it unlawful to discriminate against an employee on the basis of her/his sex or to take retaliation action against an employee who has asserted her/his rights under the Act. 42 U.S.C. §2000e-2(a) and 42 U.S.C. §2000e-3(a).

4. Title VII further provides as follows:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation

is authorized by the provisions of section 206(d) of title 29.

42 U.S.C. §2000e-2(h).

5. 29 U.S.C. §206(d), the Equal Pay Act, provides in pertinent part as follows:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

6. When the issue of salary differentials is brought under both Title VII and the Equal Pay Act, the legal standards established under the Equal Pay Act control. *Miller v. Kansas Power and Light Co.*, 585 F.Supp. 1509, 1512 (D.Kan. 1984). Thus, in order to prove her claim of salary discrimination based on sex, plaintiff has the initial burden of proving that the University paid different wages to professors of the opposite sex for work that was substantially equal in terms of skill, effort and responsibility. *Brennan v. Corning Glass Works*, 417 U.S. 188 (1974); *Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir.

1971). If plaintiff establishes a prima facie case, the burden of proof shifts to the defendant to establish that the wage differential resulted from a factor other than sex or to prove the existence of one of the three other affirmative defenses. *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982).

7. Plaintiff established a prima facie case at least with regard to some of the professors in the Department. Plaintiff demonstrated that she was paid lower wages than some of the male professors in the Department for work that was substantially equal in terms of skill, effort and responsibility.

8. The University asserted that the wage differential between plaintiff's salary and the salaries of other male professors resulted from the existence of a valid merit system. An explanation of the requirements of a valid merit system is contained in *Equal Employment Opportunity Commission v. Aetna Insurance Co.*, 616 F.2d 719, 725 (4th Cir. 1980):

> A merit system, to be recognized as valid, need not be in writing. See 29 C.F.R. §800.144 (1979). See also 109 Cong. Rec. 9203, 9208 (1963) (remarks of Reps. Griffin; Waggonner; Griffin and Goodell, respectively). Notwithstanding the absence of a writing requirement, a merit "system" must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. *Brennan v. Victoria Bank and Trust Co.*, 493 F.2d 896, 901 (5th Cir. 1974); *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 726 (5th Cir. 1970). Moreover, to be recognized, it would seem that an unwritten merit system must fulfill two

additional requirements: the employees must be aware of it; and it must not be based upon sex. See 29 C.F.R. §§800.142, .144 (1979). *Cf. Shultz v. First Victoria National Bank*, 420 F.2d 648, 654-59 (5th Cir. 1969) (if training program exemption is to be argued, the employees should be aware of the program's existence).

9. The University carried its burden of showing that the wage differential between plaintiff's salary and some of the salaries of the male professors of the Department resulted from the existence of a valid merit system. The merit evaluation system used in the Department was at all times systematic and objective. Members of the faculty within the Department were aware of the system with its standards and requirements. Even when the system was in an unwritten form, members of the faculty were very much aware of it.

10. Based on the foregoing findings of fact and conclusions of law, we conclude that judgment must be entered for the defendant and against the plaintiff on plaintiff's Title VII claim of sex discrimination in salary determinations.

11. Plaintiff also contended that the University retaliated against her after she filed the EEOC charge in January, 1977. Plaintiff claims that the University reduced her appointment to .9 in the spring of 1977 because she filed the EEOC charge.

12. To prove a claim of retaliation under 42 U.S.C. §2000e-3(a), plaintiff must show that the defendant took some adverse employment action because of plaintiff's action taken against perceived employment discrimination.

Whatley v. Metropolitan Atlanta Rapid Transit Auth., 632 F.2d 1325 (5th Cir. 1980). In *Mitchell v. Visser*, 529 F. Supp. 1034, 1044 (D.Kan. 1981), we set forth the order of proof for a Title VII retaliation action as follows:

> First, the plaintiff must prove a prima facie case of retaliatory treatment by a preponderance of the evidence. A plaintiff demonstrates a prima facie case by showing: (1) that he engaged in protected activity, i.e., he opposed or participated in Title VII proceedings; (2) that his employer was aware of the protected activities; (3) that he was subjected to adverse employment actions; and (4) that the adverse employment actions followed his protected activities within such period of time that the court can infer retaliatory motivation. *Hochstadt v. Worcester Foundation for Experimental Biology*, [425 F.Supp. 318 (D.Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976)]; *Sutton v. National Distillers Products Co.*, 445 F.Supp. 1319 (S.D. Ohio 1978); *Bradington v. International Business Machines Corp.*, 360 F.Supp. 845 (D.Md. 1973), *aff'd*, 492 F.2d 1240 (4th Cir. 1974). If this burden is met, a mandatory presumption arises, which requires the court to enter judgment for the plaintiff if the defendant does not rebut the presumption. *Texas Dept. of Community Affairs* [*v. Burdine*, 450 U.S. 248 (1981)]. The burden then shifts to the defendant to set forth, through admissible evidence, a valid, nondiscriminatory reason for his treatment of the plaintiff. If the defendant does so, then plaintiff must show that the reason advanced by defendant is a mere pretext for the kind of discrimination forbidden by Title VII. It must be emphasized that the defendant bears only a burden of production and that the burden of persuasion remains always with the plaintiff. *Id.*

13. Plaintiff established a prima facie case of retaliation. The timing of the University's action reducing plaintiff's appointment is sufficient to infer a retaliatory motive. However, the defendant articulated a valid, nondiscriminatory reason for the action taken against the plaintiff. The University reduced plaintiff's appointment after a long dispute concerning plaintiff's required course load. The University had warned plaintiff prior to the time she filed her EEOC charge that her appointment would be reduced if she did not teach the required five courses each year. After receiving this warning, plaintiff refused to teach five courses and accordingly the defendant reduced her appointment. Plaintiff failed to demonstrate that the reason advanced by the University was a pretext for retaliation. The University's handling of this dispute was entirely fair and reasonable. The University never promised plaintiff that she could teach less than five courses each academic year. Plaintiff was required by Department rules to teach five courses and the University was justified in reducing her appointment after she failed to do so.

14. Based upon the foregoing findings of fact and conclusions of law, we conclude that judgment must be entered for the defendant and against the plaintiff on her Title VII claim of retaliation.

CONCLUSION

The facts, as viewed by the court, point to but one conclusion—the University of Kansas has treated Ann R. Willner fairly and equally. It is apparent to the court that the plaintiff does not desire equal treatment but rather favored treatment. Plaintiff seeks to change the merit evaluation system used by the Department to one which emphasizes those qualities where her strengths lie. It is

not the role of the federal court to determine whether an evaluation utilized by an employer is the best possible. Our function is only to determine if the system used is applied equally and does not discriminate against a person because of their sex or some other illegal reason.

Based upon the court's review of the evidence, we believe that this order will do little to educate the plaintiff. She appears determined to continue her efforts despite the University's efforts to inform and help her. The Department of Political Science has performed remarkably over the years given the constant source of irritation provided by the plaintiff. The court hopes that the Department can continue to grow and excel with this trial now completed.

IT IS THEREFORE ORDERED that judgment be entered for the defendant and against the plaintiff on plaintiff's Title VII claims.

IT IS SO ORDERED.

Dated this 2nd day of August, 1985 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX D

(Filed June 20, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 85-2320

ANN R. WILLNER,
Plaintiff-Appellant,

v.

UNIVERSITY OF KANSAS,
Defendant-Appellee.

PETITION FOR REHEARING

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, Ann R. Willner, the above-named appellant, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this petition, appellant represents to the Court as follows:

1. The Court has overlooked or misconstrued the record in asserting untimeliness on the part of plaintiff in moving for disqualification of Judge Rogers. There are two statutes governing mandatory disqualification of judges, 28 U.S.C. sec. 144 and 28 U.S.C. 455. Section 144 contains procedural requirements, which Section 455 does not, including one of timeliness. The standard of timeliness for filing a motion under this section, according to this circuit, is "promptly after the facts forming the basis

of disqualification became known." *United States v. Gigax*, 605 F. 2d 507 (1979, 10th Circuit).

2. Judge Rogers failed to reply to plaintiff's first motion for recusal until August 8, 1984, eleven months after that motion was filed. His response (Doc. 211) did not raise untimeliness as a basis for his refusal to recuse himself. The record shows that plaintiff filed her second motion for disqualification on January 2, 1985, promptly after she received information concerning Judge Rogers' membership in and presidency of the Board of Governors of defendant University of Kansas Law School during the pendancy of the action, obtained the facts and appended documentary evidence which was appended to that motion (Doc. 326) In his order of March 11, 1985 again refusing to recuse himself, Judge Rogers could not give and did not give untimeliness as a reason. Furthermore, appellee University of Kansas' argument on disqualification in its brief (p. 18) failed to raise an issue of untimeliness.

3. Even if plaintiff had filed her motions pursuant to Section 144, she would have satisfied its timeliness provision. As this Court has recognized, plaintiff filed pursuant to Section 455. This has been widely recognized to lack any timeliness requirement. Therefor the issue of timeliness is irrelevant to plaintiff's appeal.

4. In stating that motions under Section 455 "*must* be timely filed," (emphasis supplied), the Court has misconstrued the procedural requirements for a Section 455 motion. As the court has stated in *Roberts v. Bailar*, 625 F. 2d (6th Cir. 1980):

> Neither the text nor the legislative history of Sec. 455 (a) contain any suggestion that the procedures of Sec. 144 are applicable to disqualification under Sec. 455

> (a) . . . In fact, Congress disregarded suggestions that requirements such as timeliness apply to disqualification under Sec. 455. . .

at 128 n. 8.

See also *SCA Services, Inc. v. Morgan*, 557 F. 2d 110, 117 (7th Cir., 1977); *Potashnick v. Port City Const. Co.*, 609 F. 2d 1101 (5th Cir. 1980); Wright and Miller, Sec. 3550 ("Congress deliberately chose not to put any time requirement in Sec. 455").

5. In this circuit, the court in *United States v. Hines*, 696 F. 2d 722, 729 (10th Cir., 1982) quoted at length from *Roberts v. Bailar, supra*, in emphasizing the rejection by Congress of a timeliness provision in a section 455 motion. Most recently it was stated in this circuit that 28 U.S.C. Sec. 455 lacks procedural hurdles (slip opinion, *Myra M. Hinman v. Honorable Richard D. Rogers* 10th Cir. Case No. 85-2753 and No. 86-1032, Order on petitions for writ of mandamus, page 5, paragraph 4, filed October 23, 1987).

6. Some courts apparently have chosen to turn their backs on Congressional intent and legislation and have manufactured a timeliness requirement for Sec. 455 or claimed an implicit existence for such, establishing a disagreement among circuits. The fact that some courts have done so does not warrant this Court to state in this opinion the existence of a mandatory timeliness requirement for Sec. 455 motions. The single case in this circuit cited, *Singer v. Wadman*, 745 F. 2d 606, 608 (10th Cir. 1984), is both ambiguous and inapplicable, since the motion to recuse was filed under both Sec. 144 and 455 and the decision failing to state untimeliness under both sections, the obvious inference is the applicability of Sec. 144.

7. Even if cases from other circuits cited by this Court did posit a timeliness requirement under Sec. 455, their application of this requirement can be distinguished from this Court's application with respect to alleged untimeliness. The court in *United States v. Slay*, 714 F. 2d 1093, 1094 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984) refused to consider Slay's disqualification argument because the issue had been raised for the first time on appeal. In *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F. 2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983), the court did decide the merits of the disqualification claim which the district court had also ruled on despite a finding of untimeliness. In *In re International Business Machines Corp.*, 618 F. 2d 923, 933 the motion was made after over seven years of pretrial and trial proceedings and massive discovery amounting to millions of pages of documents, the court therefore confirming the district court's finding of untimeliness as well as ruling on the merits of the question.

8. In stating that considerable discovery had been completed between the time this case was first filed in April, 1979 and the time plaintiff filed her first motion for disqualification in September, 1983, this Court has overlooked or misconstrued the facts. Hardly any discovery took place from 1979 until September, 1983, as the docket and complete record shows. No discovery requests were served by either party in 1979. In May, 1980, plaintiff served her first request for interrogatories and documents production. This request was not acted upon by defendant until October, 1981. On July 8, 1980, defendant had successfully moved to stay discovery and no actual discovery took place from April, 1979 to October, 1981. In November, 1981, plaintiff served upon de-

fendant a request for admissions which was replied to the following month. Defendant University of Kansas failed to serve any discovery requests upon plaintiff until August, 1982 when defendant's first set of interrogatories was served. This was the sole discovery item in the record for the year 1982. It was answered in January, 1983. There was no further discovery by either plaintiff or defendant until September, 1983. A total of two discovery requests by plaintiff and one by defendant from April, 1979 to September, 1983 cannot be termed "considerable discovery."

9. On page 2 of its opinion, this Court stated its intention to examine the issue of whether the trial judge erred in not recusing himself and on pages 6-7 stated its intention of reviewing "their" (sic) denial for abuse of discretion. On page 8, the Court stated that it did not attempt to reach the question of plaintiff's allegations in her motions that were denied by the judge. It therefore follows that (1) this Court has failed to carry out its stated intention and (2) it could not conclude, as it states it did, that denial did not constitute abuse of discretion without contradicting, as it apparently did, its prior statement that it did not attempt to reach the question of plaintiff's allegations. To arrive at any conclusion concerning abuse of discretion clearly would require that this Court examine the bases of plaintiff's motions and the bases of the judge's refusals, which it has failed to do.

10. In its opinion concerning the parol evidence instruction of, this Court has erred in a fashion highly prejudicial to plaintiff. In making an inference (p. 6) that Judge Rogers had determined that the exchange of

letters between Dean Cobb and plaintiff (quoted on pages 2-3 of the opinion) constituted an integrated contract, the Court has overlooked the fact that there is no evidence in the record, including the trial transcript, that Judge Rogers had made such a determination. The finding of Judge Rogers from which this Court has drawn its inference (p. 5) fails to support such an inference by its very mention of teaching load as a factor in an employment agreement in an academic context.

11. It is clear on the face of the letters exchanged between Dean Cobb and plaintiff that these did not constitute a fully integrated contract. The only terms spelled out by Cobb and agreed to by plaintiff in these letters were those of rank and salary. No mention was made in Cobb's letter of teaching load, courses, research leave, office space, research assistance, equipment, moving expenses or other conditions customarily involved in the recruitment of senior faculty. In the context of the period (1969) these were generally negotiated and agreed upon orally between the faculty member sought by the university and the chairman of the relevant department acting as agent for the university and the relevant deans and higher administrators. Evidence was presented at trial of negotiation and agreement between plaintiff and Chairman Lujan of such matters. Such makes it clear that the letters in question lacked completeness and specificity sufficient to be taken to be an integrated agreement. As is stated in Restatement (Second) of Contracts, § 209, Comment c. Proof of Integration:

> Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence.

As is further stated in Restatement (Second) of Contracts § 210, Comment b. Proof of complete integration and c. Partial integration:

> That a writing was or was not adopted as a completely integrated agreement may be proved by any relevant evidence. A document in the form of a written contract, signed by both parties and apparently complete on its face, may be decisive of the issue in the absence of credible contrary evidence. But a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties. . .
>
> It is often clear from the face of a writing that it is incomplete and cannot be more than a partially integrated agreement.

12. The testimony of plaintiff at trial concerning chairman Lujan's agreement to her condition of a teaching load of two courses per semester (Transcript, pp. 120, 125, 308) evidences the incompleteness and lack of integration of the agreement in the exchange of letters. Where a contract is incomplete or silent in any particular, according to Kansas law, parol evidence is admissible and this evidence is not limited to cases of ambiguity. *In Re Goff's Estate*, 379 P. 2d 225, 235. Clearly, in the absence of a completely integrated agreement, Judge Rogers' instruction to the jury to ignore evidence of negotiations and oral agreements (however ambiguous or conflicting the evidence) was erroneous and prejudicial to plaintiff.

13. On page 2 of its opinion, the Court has stated an error of fact in stating that the University demoted plaintiff to nine-tenths salary status in 1979. This was done in 1977, several months after plaintiff filed a complaint with the EEOC, such having been the basis for

Judge Rogers' finding that plaintiff had established a prima facie case of retaliation. A further error of fact on that page is the statement that plaintiff's Equal Pay Act complaint alleged discriminatory salary determinations. This constitutes a material error of fact in that plaintiff's Equal Pay Act complaint charged that defendant failed to apply a merit salary system. In this charge also, Judge Rogers found at trial that plaintiff had established a prima facie case, as the record shows.

14. This Court's errors of fact, including but not limited to those referred to above, taken together with its refusal to discuss or comment on plaintiff's other issues on appeal, such as the limitation of the scope of discovery to the Political Science Department, the dismissal of several of plaintiff's claims, the admissions at trial by defendant witness Schumaker, associate chairman, that a merit system was not applied (trial transcript, pp. 576-577) give rise to the inference that the Court has failed to give serious consideration to this appeal in the light of the record.

Wherefore, appellant prays the Court that a rehearing be granted and a thorough and serious reconsideration of the whole record on appeal, and that the Court's opinion dated June 1, 1988 be withdrawn and the Court enter a new opinion, reversing in particular its opinion on disqualification.

Dated this 19th day of June, 1988.

/s/ Ann R. Willner
Ann R. Willner
Plaintiff-appellant Pro Se
2112 Terrace Road
Lawrence, Ks. 66044
(913) 843-4442

CERTIFICATE OF SERVICE

I hereby certify that I served the above and foregoing Petition for Rehearing on this 19th of June, 1988, by placing a copy of the same in the United States mail, first class, postage prepaid, addressed to:

Rose Marino
Office of the General Counsel
227 Strong Hall
University of Kansas
Lawrence, Ks. 66045

Mary Beth Mudrick
5837 S.W. Smith Place
Topeka, Ks. 66614

Honorable Richard D. Rogers
United States District Court
Topeka, Ks. 66601

/s/ Ann R. Willner
Ann R. Willner